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Supreme Court, U.S.
FILED

08-332 AUG 5 - 2008

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FERNANDO MORALES-GARZA

Petitioner

v.

SUSANA LORENZO-GIGUERE, in her official capacity as Voting Counsel at the

U.S. DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Fernando Morales-Garza (pro se)
56 Pizarro Ave.
Rancho Viejo Texas 78575
703-850-0911 Cell
956-621-1131 Home/Fax

QUESTION PRESENTED

Whether the First Amendment to the United States Constitution and the word "impossible" written in the Help America Vote Act (HAVA) requires the U. S. Congress and the Department of Justice to endorse the first invention that allows voting by mail and meets the HAVA requirements of privacy and to order that any method that accomplishes that shall be adopted by the states as a guarantee of the First Amendment right to petition the government and to redress the privacy differences between those voters who can be present at a polling place and those that vote by mail.

PARTIES TO THE PROCEEDING

Petitioner in Case No. 07-41120 before the Court of Appeals for the Fifth Circuit, and before this Court, is Fernando Morales-Garza (*pro-se*). He shall hereinafter be referred as "Morales-Garza".

The respondents are Susana Lorenzo-Giguere in her official capacity as special Litigation Counsel, Voting Section U.S. Department of Justice, and Civil Rights Division. She shall hereinafter be referred as "DOJ".

CERTIFICATE OF INTERESTED PERSONS

The undersigned Fernando Morales-Garza (pro-se) certifies that he is a U.S. citizen, and inventor of a method to vote by mail with privacy, that he filed the invention with the U.S. Patent Office, and that he assigned the patent rights to a one man Delaware corporation that he controls, with family members and friends as minority shareholders of the mentioned corporation. He certifies that the name of that corporation is Vote Wherever, Inc. Furthermore, he certifies that all of the entities mentioned above, as well as all U.S. tax payers (because the electoral process cost could be less expensive) and all voters that could be allowed to vote by mail instead of spending time and money in line to vote at the polling place, shall have a

financial interest in the outcome of this petition.

JURISDICTION

The court of appeals entered its judgment on May 6, 2008. A petition for Rehearing was denied on Jun 26, 2008 (Attached). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional, Amendment I

Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people to assemble peaceable, and to petition the Government for a redress of grievances.

STATUTORY PROVISIONS INVOLVED

The Help America Vote Act (HAVA), 42 U.S.C. § 15481, provides in pertinent parts as follows:

(a) Requirements

Each voting system used in an election for Federal office shall meet the following requirements:

(1) In general

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(b) Voting system defined

(c) Construction

(1) In general

(2) Protection of paper ballot voting systems

For purposes of subsection (a)(1)(A)(i) of this section, the term "verify" may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.

STATEMENT OF THE CASE

This case is about the right to petition the government to redress the privacy differences between those voters who can be present at a polling place and those that vote by mail. The case asks for a court interpretation of the following section of HAVA 42 U.S.C. § 15481(C)(2) "... makes it impossible for a paper ballot voting system to meet the requirements ...", after Morales-Garza made possible what was called "impossible" in that part of the law.

ARGUMENT

The First Amendment to the United States Constitution, "Congress shall make no law... abridging the ... or the right of the people to ... and to petition the Government for a redress of grievances." Consequently, the hierarchy of the Federal Rules of Civil Procedures should be subordinated to the First Amendment accordingly; the Court of Appeals for the Fifth Circuit order should be overturned.

Also extracted from the First Amendment to the United States Constitution, "... or the right of the people to ... and to petition the Government for a redress of grievances." Consequently, the right to petition and the word "impossible" written in the

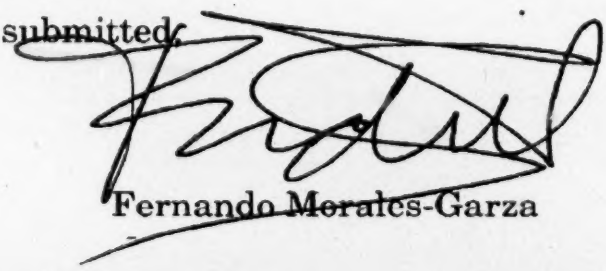
HAVA requires the Department of Justice to endorse the first invention that allows by mail voting and meets the HAVA requirements of privacy and to enforce that any method that accomplishes that shall be adopted by the states as a guarantee of the First Amendment order to redress the privacy differences between those voters who can be present at a polling place and those that vote by mail.

The word "impossible" written in the HAVA imposes a limit before that makes it not possible for paper ballot voting system to meet the privacy requirements, a limit that should be adjusted automatically without amendments by the U.S. Congress to this law, so that at the moment when someone discovers a new possible way, that limit should be adjusted immediately, consequently adjusted as soon as possible and not after prevail over all government's possible legal objections.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,



Fernando Morales-Garza

App. 1

Manually typed from the original order

Dated Jun 26, 2008:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-41120

FERNANDO MORALES-GARZA

Plaintiff – Appellant

v.

SUSANA LORENZO-GIGUERE, Special Litigation Counsel, Voting Section US Department of Justice, Civil Rights Division

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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ON PETITION FOR REHEARING EN BANC

(OPINION May 6, 2008 5 Cir., ___, ___ F. 3d ___)

Before KING, DAVIS AND CLEMENT, Circuit Judges. PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of judges who are in regular active service and not disqualified not having vote in favor (FED. R. App. P and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

E B Clement
United States Circuit Court Judge

App. 3

Manually typed from the original order

Dated May 6, 2008:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-41120
Summary Calendar

FERNANDO MORALES GARZA

Plaintiff – Appellant

v.

SUSANA LORENZO-GIGUERE, Special Litigation Counsel, Voting Section US Department of Justice, Civil Rights Division

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Texas
USDC No. 1:07-CV-17

Before King, Davis and Clement, Circuit Judges.
PER CURIAM:*

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* Pursuant to 5TH Cir R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5TH Cir. R. 47.5.4

Fernando Morales-Garza, proceeding *pro se*, appeals the district court's dismissal of his action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). We affirm, although on a different ground than that articulated by the district court.

I. FACTS AND PROCEEDINGS

On march 1, 2007, Morales-Garza filed a *pro se* "Petition for Summary Judgment", which the district court constructed as a complaint, against Susana Lorenzo-Giguere, an attorney in the Voting Section of the U.S. Department of Justice's Civil Rights Division.[1]Morales-Garza alleges that the absentee voting process of the United States failed to comply with the Help America Vote Act of 2002 ("HAVA"), 24 U.S.C. § 15301 *et seq*.[2] in support of this allegations, Morales-Garza, an inventor, claimed that he developed a system of voting that

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[1] Although not specifically stated in his complaint, Morales-Garza has conceded that he is suing Lorenzo-Giguere in her official capacity only..

[2] Morales-Garza previously filed a nearly identical "Petition for Summary Judgment" against the United States Election Assistance Commission ("EAC") on July 3, 2006. *See Morales v. U.S. Election Assistance Comm'n*, No. 1:06-46, 2006 U.S. Dist. LEXIS 96797 (E.D. Va. Aug. 14, 2006). The district court constructed Morales-Garza's filing as a motion for summary judgment, denied relief, and entered judgment for the EAC. *See id.* at *1-2. The district court found that Morales-Garza did not properly serve the complaint, made no showing that the Congress unequivocally waived sovereign immunity for the federal agencies as part of HAVA, and did not allege injury sufficient to establish standing. *See id.* at *2. Morales=Garza did not appeal that decision.

has made it possible to ensure the privacy of absentee voters. Because of his invention, Morales-Garza sought a declaratory judgment that §15481(c)(2), which preserves paper balloting procedures, "no longer protects or excuses paper ballot voting systems" from the alleged privacy requirement of §15481(a)(1)(A)(i). Morales-Garza claimed that the present system "permits intimidation, inhibition and vote trade" and that his new system could remedy these problems. In a later filing, Morales-Garza also suggested potential liability for Lorenzo-Giguere under 42 U.S.C. §1983, which provides a cause of action where any person acting under color of state law violates the Constitution or a federal law, and 28 U.S.C. §1498, which provides a cause of action where the United States uses a patented invention without license.

On May 1, 2007, Lorenzo-Giguere, represented by the United States, filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Lorenzo-Giguere argued, in part, that Morales-Garza lacked standing, that there was no private right of action in HAVA, and that the claim were barred by sovereign immunity and collateral estoppel. On September 11, 2007, the district court granted Lorenzo-Giguere's motion to dismiss under Rule 12(b)(1), finding that it lacked subject matter jurisdiction because Morales-Garza's claims were "wholly insubstantial and frivolous."On September 14, 2007, Morales-Garza filed a motion for reconsideration under Rule 59(e), which the district court denied on October 10, 2007. Morales-Garza appeals.

II. STANDARD OF REVIEW

This Court reviews the district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) *de novo. Ramming v. United States*, 281 F.3d 158, 161 (5TH Cir. 2001). This Court, however, may affirm on any ground supported by the record, including one not reached by the district court. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F3d 309, 311 (5TH Cir. 2007)

III. DISCUSSION

Morales-Garza's claims are without merit, because the federal statutes under which he seek relief do not permit him to sue an attorney in the Justice Department to seek adoption of his voter privacy system. Although the district court cited only Rule 12(b)(1) in dismissing Morales-Garza complaint, Rule 12(b)(6) provides a clear basis for dismissal and we affirm on that ground. *See Scott v. Fiesta Auto Ctr. Of San Antonio*, 273 F.3d 1095, 2001 WL 1085192, at *1 (5TH Cir. Sept. 7, 2001) (per curiam) (unpublished) (stating that "[g]enerally, if it appears from the face of the complaint that a federal claim is without merit, the court should dismiss for failure to state a claim, and not on jurisdictional grounds"). Under Rule 12(b)(6), a court should dismiss a complaint if it fails to state a claim upon which relief can be granted. This Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Reiliable Consultants,*

Inc. v. Earle, 517 F.3d 738, 742 (5TH Cir. 2008) (internal quotations omitted). "To survive a Rule

12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief is plausible on its face."*Id.* (internal quotation omitted).

Here, Morales-Garza has not pleaded sufficient facts to state a claim to relief that is plausible on its face under either HAVA, §1983, or federal patent law. First, HAVA does not provide the declaratory relief sought by Morales-Garza. *See Sandusky Country Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6Th Cir. 2004) ("HAVA does not itself creates a private right of action."); *Paralyzed Veterans of Am. V. McPherson*, No C 06-4670, 2006 WL 3462780, at *6(N.D. Cal. Nov. 28, 2006)(same); *Taylor v. Onorato,* 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006) (same). Second, § 1983, even if used to assert any potential right under HAVA, does not apply to federal officers, such as Lorenzo-Giguere, who act under federal law, and thus relief is not available under this statute. *See 42 U.S.C. §1983* (providing a federal cause of action against persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or District of Colombia"); *Campbell v. Amax Coal Co.*, 610 F.2d 701, 702 (10TH cir. 1979) (stating that § 1983 "does not apply to federal officers acting under color of federal law"). Third, Morales-Garza has not stated a claim under 28 U.S.C. § 1498(a), which allows owners of patents to recover reasonable compensation when their invention is used or manufactured by or for the United States without a license of the owner thereof or lawful right."

Morales-Garza has not alleged that he has a patent on his voter privacy system or that the United

States or Lorenzo-Giguere has used his system without permission. To the contrary, Morales-Garza actually claims that the United States and Lorenzo-Giguere have harmed him by *not* adopting his proposed new system for absentee voting. Accordingly, we hold that Morales-Garza has failed to state a claim and that the district court's dismissal was proper.

IV. CONCLUSION

The district court's dismissal of Morales-Garza's complaint is AFFIRMED.

Manually typed from the original order from the Court of Appeals for the Fifth Circuit

Dated May 26, 2008

Pursuant to 5TH Cir R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5TH Cir. R. 47.5.4

App. 9

Manually typed from the original order
Dated OCT 11, 2007:

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-07-17

FERNANDO MORALES-GARZA

Plaintiff

v.

SUSANA LORENZO-GIGUERE, Special Litigation Counsel, Voting Section US Department of Justice, Civil Rights Division

Defendant

ORDER

BE IT REMEMBERED that on October 10, 2007, the Court DENIED Plaintiff's Petition for Reconsideration. Dkt. No. 25.

Plaintiff's Petition requests that this Court reconsider the Opinion and Order on September

11, 2007 tht granted Defendant's Motion to Dismiss, Dkt. No. 24.

The Federal Rules of Civil Procedure do not recognize a Motion for Reconsideration per se. See Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990), abrogated on other grounds. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 n.14 (5th Cir. 1994) (en banc). The court will consider Plaintiff's Petition as a motion to "alter or amend the judgment" under Federal Rule of civil Procedure 59(e) as it was filed within ten (10) days after the Court entered final judgment. *See id.* See also Fletcher v. Appeal, 210 F.3d 510, 512 (5th Cir. 2000).

Motions for Reconsideration are generally disfavored and not proper tools " to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986). Generally, a Motion for Reconsideration may be granted under Rule 59(e) if the movant shows: (1) the motion is necessary to correct a manifest error or fact or law; (2) the movant present newly discovered or previously unavailable evidence; (3) the motion is necessary in order to prevent manifest injustice; (4) the motion is justified by an intervening change in the controlling law. Fields v. Pool Offshore, 1998 WL 43217, *2(E.D. La Feb. 3, 1998) *aff'd* 182 F.3d 353 (5th Cir. 1999).

The Plaintiff in his petition failed to identify a manifest error of law, present new evidence, demonstrate that reconsideration was necessary to prevent manifest injustice, or identify an intervening change in the law that warrant reconsideration.

WHEREFORE, the Court DENIES Plaintiff's Motion for Reconsideration. Dkt. 25.

DONE at Brownsville, Texas, this 10 th day of October, 2007.

Hilda G. Tagle

United States District Judge

App. 12

Manually typed from the original order
Dated SEP 11, 2007:

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-07-17

FERNANDO MORALES-GARZA

Plaintiff

v.

SUSANA LORENZO-GIGUERE, Special Litigation Counsel, Voting Section US Department of Justice, Civil Rights Division

Defendant

OPINION & ORDER

BE IT REMEMBERED that on September 11, 2007, the Court considered Plaintiff's Opposed Motion for a Hearing, Dkt. No. 12, and Defendant's Motion to Dismiss, Dkt. No. 6. With regard to the

Motion for a Hearing, The Court considered Plaintiff's Motion and Defendant's

Response to Plaintiff's Motion for a Hearing. Dkt. No. 13. With regards to the Motion to Dismiss, the Court considered Defendant's Motion Dkt. No. 6, the Memorandum in Support of Defendant's Motion to Dismiss, Dkt. No. 7, Plaintiff's Opposition to Dismiss, Dkt. No. 10, Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss, Dkt. No. 14, and Plaintiff's Response to Defendant's First Reply, Dkt. No. 15. For the following reasons, Plaintiff's Motion for a Hearing Dkt. No. 12 is DENIED and Defendant's Motion to Dismiss, Dkt. No. 6, is GRANTED.

I. Background

In July 2006, Plaintiff, Fernando Morales, appearing pro se, filed a Petition for summary Judgment to commence a lawsuit in the Eastern District of Virginia against the United States Election Assistance Commission ("EAC"). Dkt. No. 7, at 7 n.2; Dkt. No. 7,Ex. 2; Dkt. No. 10 at 6. Plaintiff requested that the court force the EAC to tell states to comply with the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.* to prevent "national chaos" Dkt. No. 7, Ex 2 at 1-2. The Eastern District Court dismissed Plaintiff's claim and held that plaintiff had not proved that Congress

had not waived sovereign immunity under HAVA, Dkt. No. 7, Ex 3 at 8-9, and that Plaintiff lacked standing to bring suit because he had not articulated anything more than a "cursory warning" of a "national chaos" and had not proved that the relief sought would remedy an individual imminent injury. *Id.* at 9-11 (asserting that his generalized grievance was insufficient to establish standing).

On March 1, 2007, Plaintiff, Fernando Morales-Garza[3] appearing pro se, filed a Petition for Summary Judgment, Dky. No. 1, to initiate the instant case. Plaintiff alleged that Defendant, Susana Lorenzo-Giguere, as "one of the specific neurons of the [Department of Justice] brain charged with the interpretation of HAVA", failed to respond to the states' failure to implement voting procedures that would comport with HAVA requirements. Dkt. No. 1 at 1. Plaintiff requested that the Court interpret HAVA and instruct Defendant to take action to prevent future HAVA violations. *Id* at 2, 5. Plaintiff explained that the EAC, a new federal agency established to help with the administration of federal elections, implicitly requested that inventors submit solutions to the privacy concerns with absentee voting, yet when

[3] Plaintiff admits to being the same person who brought the case against the EAC in 2006, Fernando Morales v. U.S. Election Assistance Commission, 1:06MC46, GBL/TRJ (E.D. Va 2006). Dkt. No. 10, at 2,, 3, 6.t

Plaintiff, as an inventor, submitted his proposed solution it was not utilized. Dkt. No. 10, at 4. Plaintiff stated that the HAVA violation and the impending HAVA violations caused him "injury in fact" by diluting his vote and causing him to lose confidence in the electoral process. Id. at 5-6; Dkt. No. 1, at 5. Plaintiff further indicate that he suffered injury when the EAC disregarded his proposed solution. Dkt. No. 10,at 5. Plaintiff asserted causes of action based on 42 U.S.C. § 15481 (HAVA), 42 U.S.C. § 1983(civil action for deprivation of rights), and 28 U.S.C. §1498 (patent and copyright). Dkt. No. 1, at 4; Dkt. No. 10, at 1, 3, 4, 7.

Defendant moves for dismissal arguing that the Court has no subject matter jurisdiction and that Plaintiff failed to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(1),(6) (2006)

II. Motion for a Hearing

When considering a motion to dismiss, a court may allow parties to submit affidavits, engage in further discovery, present oral testimony, or conduct an evidentiary hearing. Morgan v. Kindom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994). However, an "evidentiary hearing is not required". *Id.* at 273.

The instant motion to dismiss involves legal issues made sufficiently clear in the parties' multiple

filings. Dkt. Nos. 1, 6, 7, 9, 10, 14, 15. Therefore, the Court finds that a hearing on the issues is not necessary. Plaintiff's Motion for a Hearing is DENIED. Dkt. 12.

III. Motion to Dismiss

A. Rule 3: The Complaint

Generally, a "document filed pro se is "to be liberally constructed". Erikson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); see also Miller v. Stanmore, 636, F.2d 986, 988 (5th Cir. 1981). In the instant motion to dismiss, Defendant asserts that this Court lacks jurisdiction because Plaintiff failed to comply with rule 3 of the Federal Rules of Civil Procedures and file a complaint with the Court. Dkt. No. 7, 11. In support, Defendant cites two district court cases from the Sixth and Third Circuits; however, those cases are distinguishable from the instant case. Defendant points to P.K. Family Restaurant v. I.R.S., where the court held an initial pleading styled "Temporary Restricting Order to Keep Business in Operation" did not satisfy the requirement that the plaintiff file a complaint to commence the lawsuit. 535 F. Supp. 1223, 1224 (D. Ohio 1982). However, in that case, the plaintiff was represented by counsel and still failed to comply with Rule 3. *Id.* at 1223-24. Defendant also looks to

Lampenfield v. IRS, where the court held that a motion for injuctive relief did not satisfy the Rule 3 requirement. 1989 U.S. Dist. Lexis 14329, at *5(W.D. Pa. 1989). Similarly, in *Lampenfield*, the plaintiffs were represented by counsel and nonetheless faild to file a complaint. *Id.* at 4.

Plaintiff asserts that his Petition is sufficient to satisfy Rule 3 because a district court previously accepted a similar Petition for Summary Judgment which he used to commence a substantially similar case. Dkt. No. 10, at 3. However, in that case, the court seemed to treat the Petition for Summary Judgment as a motion for summary judgment. See Dkt. No. 7, Ex. 2 at 1,12 (ordering that Plaintiff's Motion for Summary Judgment be denied).

In this instant case, Plaintiff is pro se. This Court finds that justice would not be served were this Court read narrowly Plaintiff's initial filing and dismiss the case because Plaintiff failed to file a document styled "Complaint." See Erickson, 127 S. Ct. at 2200; Miller, 636 F.2d at 988. In Plaintiff's Petition for Summary Judgment, Dkt. No. 1, he attempts to provide the Court with the legal and factual grounds for a claim against Defendant. In the Rationale section of the Petition, Plaintiff alleges Defendant's injurious actions and subsequent injury. *Id.* at 5. Plaintiff also request relief from the Court. *Id.* As such, Plaintiff's initial

filing, Dkt. No. 1, can be read to satisfy the requirements for a complaint. FED. R. Civ. P. 8(a) (requiring a short, plain statement of the grounds for jurisdiction, a short, plain statement of grounds for relief, and demand for judgment for relief).

Plaintiff's initial filing requests that the court interpret HAVA, Dkt. No. 1, at 5. Not until Plaintiff's response to Defendant's motion to dismiss does the Plaintiff explicitly state the grounds on which he asserts he is entitle to relief. Dkt. No. 10. In Plaintiff's response, he asserts three federal statutes that provide the grounds for his suit: 42 U.S.C. § 15481 (HAVA),42 U.S.C. § 1983 (civil action for deprivation of rights), 28 U.S.C. § 1498 (patent and copyright). *Id.* at 1 However, in Plaintiff's initial filing on March 1, 2007 he only mentioned § 15481 as possible ground for relief. Dkt. No. 1, at 4. Not until Plaintiff's filing on May 8, 2007, when responding to Defendant's Motion to Dismiss, did Plaintiff assert that 42 U.S.C. § 1983 and 28 U.S.C. § 1498 also provide grounds for relief. Dkt. Nos. 9, 10. Plaintiff did not seek Court approval for this late amendment. FED. R. Civ. P. 15(a). However, Defendant did not object to this late attempt to amend the initial filing and in fact responded to Plaintiff's amended claims. Dkt. No. 14.

Plaintiff asserts three grounds for relief, all of which "arise under" federal law and give this

Court original jurisdiction. 28 U.S.C. § 1331 (2007); Miller v. Stanmore, 636 F.2d 986, 989 (5th Cir. 1981). Defendant submits that this case should be dismissed based on Federal Rules of Civil Procedure 12(1),(6). Dkt. Nos. 6, 7.

B. Rule 12(b)(1): Subject Matter Jurisdiction

Rule 12(b)(1) allows a court to dismiss a lawsuit where the pleader proves that the court "lacks jurisdiction over a subject matter." FED. R. Civ. P. 12(b)(1). Essentially, Plaintiff bears the burden of establishing that this Court has subject matter jurisdiction over the varius claims he raised. Ramming v. U.S., 281 F.3d 158, 161 (5th Cir. 2001). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." Id. (citing Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998)). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." Home Builders Ass'n of Miss., Inc 143 F.3d at 1010 (quoting Nowak v. Ironworkers

local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996)). Plaintiff asserts three statutory grounds for this case: 42 U.S.C. § 15481, 42 U.S.C. § 1983 and 28 U.S.C. § 1498, Dkt. No. 10 at n1. All three are federal statutes and therefore, Plaintiff implicitly asserts that this Court has Federal question jurisdiction. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). For federal question cases brought under § 1331, a court must not dismiss the suit but for two exceptions: (1) where the claim "clearly appears to be immaterial and made soly for the purpose of obtaining jurisdiction or [(2)] where such a claim is wholly insubstantial and frivolous." Bell v. Hood, 327 U.S. 678, 682-83 (1946). However misplaced, Plantiff's case does rely upon the federal claims asserted and thus they cannot be considered "immaterial" to the complaint. Southpark Square Ltd. V. City of Jackson, 565, F.2d 338, 342 n.5 (5th Cir. 1977). Nonetheless, the second *Bell* exception does apply and thereby strips this Court of jurisdiction.

This Court may find that the causes of action Plaintiff asserts are insubstantial and frivolous if they are "obviously without merit or because [their] unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject." Id. at 342 (quoting Cal. Water Service Co. v. City of Redding, 304 U.S. 252, 255 (1938)).

While a jurisdiction inquiry should generally not reach the merits of the case, Weir v. Muller, 527 F.2d 872, 873 (5th cir. 1976), the second *Bell* exception allows this Court to reach the merits of Plaintiff's claims. Southpark Square Ltd., 565 F.2 at 343 n.7.

Plaintiff's claims are insubstantial and frivolous, and therefore this Court does not have subject matter jurisdiction over this action. First, the declaratory relief sought under § 15481 is not available. Defendant incorrectly asserts that collateral estoppel[4] and sovereign immunity[5] prevent jurisdiction. Nonetheless, Plaintiff's § 15481 claim cannot justify this Court's jurisdiction. Sandusky Co. Democratic Party v. Blackwell, 387 F.3d 565, 572 (6th Cir. 2004)

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[4] Collateral estoppels, or issue preclusion, prevents repeated litigation of the identical issue of law or fact where the issue, trivial or non-trivial, was actually litigated by the same parties, necessary to the previous court's judgment, and reviewed under the same standard as the present issue. Duffy & McGovern Accommodation Services v. QCI Marine Offshore, Inc., 448 F.3d 825, 829-30 (5th Cir. 2006). This Court finds that the issues in the instant complaint have varied enough from the prior complaint that collateral estoppel does not bar consideration of the issues.

[5] Plaintiff is seeking declaratory relief, and therefore sovereign immunity is not the shield Defendants asserts it to be. The Declaratory Judgment Act. 28 U.S.C.A. § 2201, avoids the sovereign immunity hurdle and gives this Court jurisdiction over the instant action to extent Plaintiff's claims survive other jurisdictional hurdles. Aetna Life Ins. Co. of Hartford, Conn. V. Haworth, 300 U.S. 227, 241 (1937).

('HAVA does not itself create a private right of action."); Paralyzed Veterans of Am. V. McPherson, 2006 WL 3462780, at *7(N.D. Cal. 2006) (indicating that HAVA does not provide a cause of action for individuals suits for damages and declaratory or injunctive relief). Plaintiff contention that EAC' implicit call for a solution to the privacy dilemma, Dkt. No. 10, at 7 does not establish that Congress statutorily granted a private cause of action under HAVA. Blessing v. Freestone, 520 U.S. 329, 340-41 (1997)

Moreover, a HAVA claim bolstered by § 1983 would still not grant this Court jurisdiction. Compare Taylor v. Onorato, 428, F. Supp.2d 384, 386-87 (W.D. Pa. 2006) (holding that § 1983 does not enable individuals to sue for HAVA violations, rather "the appropriate remedy is an action by the federal government to discontinue funds to the jurisdiction") with Sandusky Co. Democratic Party, 387 F.3d at 537 (indicating § 1983 may provide an avenue for individuals claims under HAVA, as to hold otherwise foreclose federal judicial review of state actions which abridge or deny individuals right's to vote). Section 1983 applies to state officials acting under color of state law who violate federal law. 42 U.S.C.A. § 1983. While Plaintiff is suing Defendant in her official capacity, Defendant is a federal officer, Section 1983 does not apply to

federal officers. Thus, § 1983 cannot save HAVA claim.

Similarly, § 1498 does not provide a valid ground for suit. Section 1498 protects patented inventions from use by others without a license or permission. 28 U.S.C.A. § 1498. Plaintiff asserts the opposite. While Plaintiff does not address whether his invention was patented, he asserts a claim because the EAC did not use his product when it was available to them. Dkt. No. 10. Section 1498 does not provide a claim or remedy for the scenario Plaintiff presents.

As Plaintiff failed to assert a viable private cause of action under federal law, this Court lacks subject matter jurisdiction over the instant suit. Therefore, Motion to Dismiss, Dkt. 6, is GRANTED.

IV. Conclusion

WHEREFORE the Court DENIES Plaintiff's Motion for a Hearing, Dkt. No. 12, and GRANTS Defendant's Motion to Dismiss, Dkt. No. 6.

DONE at Brownsville, Texas this 11 th day of September, 2007.

Hilda G. Tagle
United States District Judge